SL. No.1

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI, HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 11.07.2024 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**Company Petition IB/54/2021**
NAME OF THE COMPANY	
NAME OF THE PETITIONER(S)	**L & T Infrastructure Finance Company Ltd**
NAME OF THE RESPONDENT(S)	**Suman Paturu & Others**
UNDER SECTION	**95 of IBC**

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this petition is allowed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Apoorva

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II

CP (IB) No.54/95/HDB/2021

Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy Code, 2016 (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019

In the matter of

Between:

L & T Infrastructure Finance Company Ltd.
Having its registered Office at:-
Brindavan, Plot No. 177, CST Road,
Kalina, Santacruz (East), Mumbai City,
Maharashtra, India – 400098.

…Financial Creditor/Petitioner

AND

Mr. Sumanth Paturu,
Door No. 2-2-20/21, A(C-10 &11),
D.D. Colony, Amberpet,
Hyderabad - 500 007.

…Personal Guarantor/Respondent No.1

M/s. ICOMM Tele Limited,
Plot No. 40-46, Phase-I, IDA,
Cherlapally, Hyderabad-500051

…Corporate Debtor/Respondent No.2

Date of Order: 11.07.2024

CORAM:
Hon'ble Sri Rajeev Bhardwaj, Member (Judicial)
Hon'ble Sri Sanjay Puri, Member (Technical)

Counsels present:
For the Applicant : Mr. Shabbeer Ahmed, Advocate
For the Respondent No.1 : Mr. Naresh Kumar Sangam, Advocate

CP (IB) No.54/95/HDB/2021

Date of Order: 11.07.2024

Per: [Rajeev Bhardwaj, Member (Judicial)]

O R D E R

1. This application has been filed by L&T Infrastructure Finance Company Ltd. (hereinafter referred as **Financial Creditor / FC**) under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 to initiate Insolvency Resolution Process against Personal Guarantor, Mr. Sumanth Paturu (hereinafter referred to as **Personal Guarantor (PG) /Respondent No.1**) of M/s. ICOMM Tele Limited (hereinafter referred as **Corporate Debtor/ CD**).

2. **The Applicant's Case:**

2.1 As per the "Facility Agreement" dated 22.08.2008, as amended from time to time, the CD availed credit facilities of Rs. 50 Crores from the FC vide sanction letter dated 21.07.2008. The Respondent No.1 stood guarantor for the repayment of the loan and executed Guarantee Deed dated 11.01.2013 in favour of FC.

2.2 Upon failure of the CD to repay the loan, the FC initiated the Corporate Insolvency Resolution Process (CIRP) by filing C.P.No.462/7/HDB/2018, which was admitted vide order dated 04.10.2018. Subsequently, resolution plan was approved on 17.10.2019.

2.3 A demand notice was sent by the FC to the PG on 19.12.2019, requesting the payment of the unpaid debt of the CD, amounting to Rs. 46,91,20,330/- (Rupees Forty-Six Crores Ninety-One Lakhs Twenty Thousand Three

Hundred and Thirty) as of 04.10.2018, within 14 days from the date of receipt of the notice.

2.4 The PG failed to repay the debt amount to the FC. In view of this default, the Financial Creditor has preferred the instant application under section 95(1) of the IBC.

3. **The Respondent No.1's Case:**

In the counter, the Respondent No.1 has contended and contested the averments made by the applicant by submitting|:

3.1 As per the approved resolution plan, the total claims of all the FCs of CD, including the FC, were Rs.1,907,97,41,110/. Out of this amount, Rs.603,52,59,406/-was paid in cash and the balance amount of Rs.1,304,44,81,704/- was converted into equity shares of CD.

3.2 Accordingly, the FC who submitted a claim for Rs. 46,91,20,330/- before the Resolution Professional of the CD, received Rs. 5,96,42,659/- in cash and the remaining debt amount of Rs.40,94,77,670/- was converted into 4,09,47,767 equity shares of Rs. 10/- each. Thus, the liabilities to all FCs of the CD were fully satisfied after the conversion of debt into equity. Consequently, neither the CD nor the PG owes any loan, as these were fully repaid through cash and debt conversion to equity. As a result, the total paid-up share capital of CD was reduced according to the approved resolution plan, including the share capital that existed before the debt-to-equity conversion. A copy of Form INC-28 filed with the Registrar of Companies (RoC), including the attachments therein, is enclosed as **Annexure-3**.

3.3 It is claimed that once debt of the FC is converted to equity, pursuant to the resolution plan approved by the CoC with an 83.89% majority and later on approved by this Authority, the debt is fully satisfied. Therefore, the FC cannot claim any further amount from the PG. The subsequent reduction of the entire share capital does not grant any new right to FC for claiming additional amounts against the satisfied debt.

3.4 On 25.08.2016, some of the other FCs of the CD also converted part of their debt into equity, and accordingly the CD allotted shares to them vide **Annexure 4**. Hence, the loan amounts due to these FCs were reduced proportionally. According to clauses 7.1 and 7.2 of the approved resolution plan, all equity including previously allotted shares and those allotted under clause 6 of the resolution plan were extinguished. In consequence, once the debt is converted into equity, the debt is considered satisfied to the extent of the allotted shares. Subsequent reductions in the CD's capital do not create new liabilities for the borrower nor do they create fresh liabilities for the PG.

3.5 To support the aforesaid contention, the PG has relied on ***order dated 25.04.2019 in IA No. 665 of 2018 and IA No. 52 of 2018 in CP (IB) No. 24/07/HDB/2018***of this Authority. The same decision was upheld by the ***Hon'ble NCLAT*** in ***Company Appeal (AT) (Ins) No. 976 of 2019***. Further, it is a well-settled law that once the liability of the principal debtor gets extinguished, the liability of the guarantor also gets ceased and in this regard; reference has been made to the decision of the Hon'ble High Court of Punjab and Haryana in the matter of ***Shri Kundanmal Dabriwala vs. Haryana Financial Corporation and another***.

3.6 On the question of limitation, the PG has referred to column 3 of Part III of the Application showing that the debt was due on 30.11.2012, while according to column 4, the default occurred on 31.03.2015. Hence, the limitation for filing the present petition is three years from 31.03.2015, which ends on 31.03.2018. The FC issued a demand notice to the PG on 01.10.2015 which material fact has been suppressed by the FC and accordingly, the limitation starts from the date of invocation of the guarantee and ends on 01.10.2018. Furthermore, according to the FC's claim, the demand notice was issued on 19.12.2019, which is after the expiry of the limitation period for the claim against the principal debtor. Therefore, the present petition is also barred by limitation. In support of aforesaid contentions, the PG has placed reliance on the judgment of the Hon'ble Supreme Court of India in ***Syndicate Bank vs. Channaveerappa Beleri and others (2006) 11 SCC 506.***

3.7 It is submitted that the CD is not currently under CIRP or liquidation and no application for such processes is pending before this Authority. Therefore, the petition against the PG is not maintainable under section 95 of the IBC, 2016. Similar observations were made by the ***Hon'ble National Company Law Tribunal, Mumbai Bench, in IA No. 1062/2021 in CP No. 293/2020 and CP (IB) No. 1365/MB-IV/2020.***

4. **The Applicant's Contentions in rejoinder:**

In the rejoinder, the Applicant has reaffirmed and reasserted the contentions put forward in the application and submitted:

4.1 The conversion of the FCs debt into equity was only a notional exercise. The total claim of all FCs, including fund and non-fund based facilities, was Rs.1907,97,41,110/-, out of which Rs.603,52,59,406/- was proposed

for payout. The remaining Rs.1304,44,81,704/- (referred to as "Part A Fund Based Debt") was proposed to be converted into 130,44,40,000 equity shares of CD at a face value of ₹10 each. This process was preceded by a ₹10 crore equity investment from the Successful Resolution Applicant (SRA), who subscribed to 1 crore equity shares of the CD at ₹10 each.

4.2 Although one crore equity shares were issued to the SRA, no such shares were issued to the FCs. The conversion of the "Part A Fund Based Debt" into equity was only a notional measure to write off the debt owed by CD to the FCs and prevent any future claims against the CD. This was done to clear CD's books. Form PAS-3 was filed with the ROC for issuing shares to the SRA, but no such form was filed for the FCs. As a result, no equity shares were actually given to the financial creditors.

4.3 According to Clause 5.3 of Chapter IV of the resolution plan, the SRA proposed to settle Rs.190 crores towards the fund-based claims of FCs, out of a total claim of Rs.1494.44 crores. The Applicant received Rs.5.96 crore towards its share of a total claim of Rs. 46.91 crores from the SRA. The remaining balance claim of Rs. 40.95 crores cannot be extinguished by the partial payment of Rs. 5.96 crores or by a notional conversion of the balance debt into equity. The PG must prove whether the FC ever received equity in the CD as per the resolution plan. If not, the FC can still recover the remaining amount from the PG.

4.4 Even if the FC's remaining debt of Rs. 40.95 crores had been converted into equity, the FC would not have acquired any rights related to owning equity shares, such as voting on share capital reduction, allotting additional shares, appointing directors, or calling general meetings. Thus, the claim of PG that loans were fully repaid is incorrect. To issue shares, both a board

meeting and an Extraordinary General Meeting (EGM) are required and a special resolution must be passed at the EGM, followed by filing of Form PAS-3. In this case, no EGM was held and Form PAS-3 was not filed for issuing shares to the FC, showing that the conversion was only notional and aimed at avoiding future debt liabilities for the CD. Form INC-28 filed by CD after the resolution plan's approval only notifies the ROC about this Authority's order and does not show that shares were allotted to the FC.

4.5 Form PAS-3 of 2016 does not show the FC as an allottee of equity shares. Consequently, the FC was not allotted any equity shares in 2016 or 2019 following the resolution plan's approval. Even after approval of Resolution Plan the FC has the right to proceed against PG as per the Clause 5.8 of Chapter IV of the resolution plan. This clause makes it clear that, notwithstanding any other provisions in the resolution plan, the FCs retain their rights to act against personal guarantors. This right takes precedence over any conflicting terms within the Resolution Plan.

4.6 Furthermore, Clause 7.4 of Chapter IV of Resolution Plan states that all claims, both present and future, against the company and its stakeholders shall be extinguished, except against the former promoter directors of the Company. Since the PG is a former promoter director of the CD, this clause indicates that claims against them are not extinguished by the resolution plan.

4.7 Under Clause 18 of the Deed of Guarantee, PG specifically has covenanted that the guarantee would not be exhausted by any payments made by the principal borrower, and the guarantee would remain valid and binding until all dues are repaid in full and as per Clause 4 the guarantee is a continuing one and remains in effect until the borrower repays all secured obligations.

Therefore, the PG's claims are contrary to both resolution plan and the Guarantee deed.

4.8 To support its contentions, the FC has placed reliance on the judgment of the Hon'ble Supreme Court of India in ***Lalit Kumar Jain vs. Union of India &Ors (Transferred Case (Civil) No. 245/2020***). It is submitted that the FC received payments on 30.09.2018, which counts as an acknowledgment of debt, bringing the application within the limitation. The cause of action began on 28.01.2016 with the invocation of Strategic Debt Restructuring (SDR) and continued on 04.10.2018 when the application under section 7 of the IBC was admitted against the CD. Further cause of action occurred on 17.10.2019 with the approval of the resolution plan and on 31.03.2020 with the receipt of Rs. 5.96 crores from the SRA. Moreover, the demand notice issued on 19.12.2019 also provides a new cause of action. Therefore, the present application is well within the limitation period. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court of India in ***Margaret Lalita Samuel versus Indo Commercial Bank Limited, AIR 1972 SC 102.***

5. We have heard learned counsel for both the parties and have also gone through the entire record.

6. Admittedly, the CD availed loan facilities of Rs.50 Crores from the FC and the Respondent No.1 stood as guarantor for the repayment of the loan amount by executing guarantee deed dated 11.01.2013 **(Annexure-6 of the Application)**. The FC initiated CIRP against CD by filing C.P. No. 462/7/HDB/2018, which was admitted on 04.10.2018. Subsequently, resolution plan was approved by this Authority on 17.10.2019.

7. The following issues arise for consideration:

   i. *Whether the application is barred by limitation.*
   ii. *Whether the FC's debt was converted into equity, thereby extinguishing the PG's liability.*
   iii. *Whether the FC can maintain an Application under section 95(1) of the IBC against the PG when the CD is not under CIRP or liquidation.*

Limitation

8. While the IBC is silent on the applicability of Limitation Act, section 29 of the Limitation Act states that every legislative enactment, be it central or state legislation, is guided by the Limitation Act unless such enactment "expressly excludes" itself. Thus, the term "expressly excludes" can be interpreted that if the intent of the legislature is to make the special statute free from limitation, express exclusion is not necessary. In case of IBC, the provisions of the Limitation Act were expressly made applicable by introduction of Section 238A of the IBC. Another reference to Limitation Act in IBC is under Section 60(6) which only limits the applicability of the Act for the period of the moratorium, thus, the same does not bar its application to initiation under section 7, 9 and 10 of the Code.

9. The period of limitation for filing applications for initiation of insolvency proceedings would be three years from the date of default under Article 137 of the Limitation Act [See ***B.K. Educational Services (P) Ltd. versus Parag Gupta & Associates AIR 2018 SC 560***]. The Hon'ble Supreme Court in ***Trustee's Port Bombay versus. The Premier Automobile 1981 AIR 1982*** held that the starting point of limitation is the accrual of the cause of action. In ***K. Shashidhar versus Indian Overseas Bank (2019) 12 SCC 150***,

wherein the Hon'ble Supreme Court restated principles laid down ***in B.K. Educational Services*** supra and reaffirmed that the right to sue under the Code accrues on the date when default occurs and if the default occurred 3 years prior to the date of filing of the Application, the same would not amount to debt due and payable under the Code. [Also see ***Sesh Nath Singh and Ors. vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. and Ors. (2021)7 SCC 313***].

10. In part III of the Application, the date of default is mentioned as 31.03.2015 and debt was shown due on 30.11.2012. The PG agreed to pay entire loan amount if any default is made by the CD vide agreement dated 11.01.2013 **(Annexure-6 of the Application).** The present Application has been filed on 06.03.2020. For filing an application under section 95 of the IBC, there is a limitation period three years from the date of arising of cause of action.

11. Therefore, crucial date to determine the limitation is the date when the cause of action has arisen. At least, the cause of action cannot be prior to the date of execution of guarantee deed i.e.11.01.2013. It is the terms and conditions of the guarantee agreement which will determine the liabilities of the PG.

12. Clause Nos. 2, 4, 13 and 23 of the guarantee deed **Annexure-6** are relevant, which are reproduced below:

> *2. In the event of any default on the part of the Borrower in payment/repayment and in reimbursement of any of the monies referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the MRA, the Guarantors shall, upon demand from the Security Trustee/Lenders forthwith pay to the Security Trustee/Lenders without demur and protest all the amounts payable by the Borrower.*
>
> *4. The Guarantors hereby declare that this Guarantee shall be a continuing guarantee and shall remain in full force and effect till such time as the Borrower repays in full, the Secured Obligations payable to the Lenders.*

> *13. The Guarantors affirm, confirm and declare that any balance confirmation and/or acknowledgment of debt and/or admission of liability given or promise or part payment made by the Borrower or the authorised trustee of the Borrower to the Lenders / Security Trustee shall be deemed to have been made and/or given by or on behalf of the Guarantors themselves and shall be binding upon each of them.*
>
> *23. Any demand for payment or notice under this Guarantee shall be sufficiently given if sent by post to or left at the last known address of the Guarantors or their personal representative(s), such demand or notice is to be made or given, and shall be assumed to have reached the addressee in the course of post, if given by post, and no period of limitation shall commence to run in favour of the Guarantors until after demand for payment in writing shall have been made or given as aforesaid and in proving such notice when sent by post it shall be sufficiently proved that the envelope containing the notice was posted and a certificate by any of the responsible officers of the Security Trustee / Lenders that to the best of his knowledge and belief, the envelope containing the said notice was so posted shall be conclusive as against the Guarantors, even though it was returned unserved on account of refusal of the Guarantors or otherwise.*

13. Perusal of the terms and conditions make it clear that the guarantee is continuous and liability of the guarantor and borrower is coextensive and coterminous. The liability of the PG will arise once demand is made by the lender i.e. FC.

14. An agreement between the guarantor and creditor is separate and collateral contract distinct from the contract of debt between the principal debtor and creditor. The contractual terms dictate the nature and magnitude of said liability. Hence, the creditor may initiate legal proceedings against both the corporate debtor and its personal guarantor simultaneously, or separately. Proceedings against the personal guarantor may be either to recover the entire amount, or the remaining amount. Here, we also rely upon the judgment of the Hon'ble Supreme Court in ***Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Limited and Another 1996 (5) SCC 450***, wherein it was held:

> 4.It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank

> guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.
>
> (own emphasis)

15. No doubt, the obligation of the guarantor is co-extensive and coterminous with that of the principal borrower to defray the debt, as explained in Section 128 of the Contract Act, but the liability of the principal debtor and surety are separate although arising out of the same transaction and even the liability of surety does not also, in all cases, arise simultaneously. We may profitably refer to the decision of the Hon'ble Supreme Court in ***State Bank of India v. Index Port Registered and ors (1992) 3 SCC 159,*** wherein it was held:

> *16. "In Halsbury's Laws of England Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."*
>
> *17. In Hukamchand Insurance Co Ltd. Versus Bank of Baroda, AIR (1977) Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed: -*
>
> *"The question as to the liability of the surety, its extent and the manner of its enforcement has to be decided on first principles as to the nature and incidents of surety ship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."*
>
> *18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor. so long as the creditor satisfies the court that the principal debtor is in default."*

(own emphasis)

16. The Lordships of the Hon'ble Supreme Court in ***Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills and others (2002) 5 SCC 54*** have observed:

> 33. "Adverting to the contract of guarantee be it noted that though it is not a contract regarding a primary transaction: but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefore the Statute has provided both the creditor and the guarantor some relief as specified in this Chapter of Contract Act (between Sections 130 to 141). Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor. It is in this context strong reliance was placed on a decision of the Privy Council in China and South Sea Bank Ltd. v. Tan (1989 (3) All ER 839), wherein Lord Temple man speaking for the Council stated the law as below: - (All ER p. 842 c-h)

"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security, he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is

worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in Watts v. Shuttleworth (1860) 5 H&N 235 at 247-248: 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

17. In the judgment of ***Margaret Lalita Samuel v. Indo Commercial Bank Limited, AIR 1972 SC 102*** also the Hon'ble Supreme Court held that cause of action against the guarantor who executes a continuing guarantee arise on the date of demand.

18. The FC issued the demand notice dated 01.10.2015 (**Annexure 10 of the counter**), asking the PG to pay the amount and thus, period of limitation commences from that date.

19. Once limitation starts, it can be extended only under the Limitation Act. In ***Jignesh Shah and Another versus Union of India and Another (2019) 10 SCC 750,*** the Hon'ble Supreme Court has held that "when time begin to run, it can only be extended in the manner prescribed in the Limitation Act". The Law declared by the Hon'ble Supreme Court is explained clearly in Para 21 of the said judgment, which read as follows: -

"Para 21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run. It can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under section 18 of the Limitation Act would certainly

extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding".

20. As such, when the cause of action has started on 01.10.2015, the FC was to file the case within next 3 years unless time was extended under sections 18 or 19 of the Limitation Act or there was promise to pay time barred debt under Section 25(3) of the Contract Act. We may refer to the decision in ***Dena Bank vs. C. Shiva kumar Reddy and Ors. (2021)10 SCC 330, Asset Reconstruction Company (India) Limited v. Bishal Jaiswal and Anr. (2021)6 SCC 366 and Kotak Mahindra Bank Limited vs. Kew Precision Parts Private Limited and Ors. (2022)9 SCC364.***

21. The CD paid a part of the amount i.e. Rs.11,00,655/- on **30.09.2018** (***Annexure 17 of the application***), thus acknowledging the liability. According to Clause 13 of guarantee deed, the PG is bound by the CD's acknowledgment. This part payment falls under section 18 of the Limitation Act, 1963, thereby extending the limitation period.

22. The CD has also acknowledged the debt in its reply (**Annexure 10 of the application dated 16.03.201**7) of OTS proposal to the FC, which further binds the PG as per Clause 13 of guarantee deed.

23. Hence, the Application filed on 06.03.2020 is well within the limitation period.

Conversion of FC's debt into equity

24. In the resolution plan, it is proposed to pay an amount of Rs.603,52,59,406/- out of Rs.1907,97,41,110/- owed to the FCs. The remaining Rs.1304,44,81,704/- was to be converted into equity shares of Rs.10 each. On 16.12.2019, the Board of Directors of the CD passed a resolution

approving the conversion of FC's debt into equity shares, specifically converting Rs. 40,94,77,670 of debt into 4,09,47,767 equity shares. In view of conversion of debt into equity shares, learned counsel for the PG submitted that the debt of FC has already been repaid fully on converting it into equity. He further contends that once the plan is approved by this Authority as per Clause 9 of Chapter V of the Resolution Plan, no other approvals including under section 62 of the Companies Act 2013 are required. The relevant extract of the clause is mentioned here:

> *6.2. .....It is clarified that the NCLT Approval Order approving the Resolution Plan shall constitute adequate approval for undertaking the Part A Fund Based Debt Conversion and the issuance of ordinary equity shares of the Company having face value of Rs. 10 each, in accordance with Section 42 and Section 62(1)(c) of the Companies Act, 2013, and all other Applicable Laws and accordingly, no approval or consent shall be necessary from any other Person/ Government Authority in relation to Part A Fund Based Debt Conversion whether under any agreement, the constitution documents of the Company or under any Applicable Law.*

25. The approval of the resolution plan by this Authority was notified by the CD to the RoC by filing FORM INC-28. About the SRA, the CD submitted Form PAS-3 (**Annexure 4, page 119 of the counter**), but did not file any such form concerning the FCs.

26. The PAS-3 form is filed for the 'Return of Allotment' under section 39(4) of the Companies Act, 2013 read with Rule 12 of the Companies (Prospectus and Allotment of Securities) Rules, 2014. The form must be submitted to the Registrar of Companies within 30 days from the date of the allotment of shares. The relevant provisions are here as under:

> **Section 39**: Allotment of securities by company.
>
> xxxx
>
> (4) Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed."

Rule12: Return on allotment-

(1) Whenever a company having a share capital makes any allotment of its securities, the company shall, within thirty days thereafter, file with the Registrar a return of allotment in Form PAS-3, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.

(2) There shall be attached to the Form PAS -3 a list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees and the list shall be certified by the signatory of the Form PAS - 3 as being complete and correct as per the records of the company".

xxxxx

27. Thus, we are of the opinion that the aforementioned steps are essential for the actual allocation of shares to the allottees in effective compliance with the resolution plan. However, the CD did not comply with the mandatory procedure for converting debt into equity except passing the Board Resolutions. For this reason, we conclude that the CD provided substantial documents, including those did not relate to the allotment and issuance of physical shares to the lenders, nor did it file the PAS-3 with the RoC to demonstrate that the shares were actually transferred to the FCs and the debt was fully repaid.

28. Moreover, it is important to note Clause 7.1 of Chapter V regarding capital reduction of the resolution plan, which says that that the SRA shall remain the sole shareholder of the CD, holding 100% of its shares, making it evident that there will be only one shareholder after the capital reduction. Therefore, it is ambiguous to claim that the debt of the FC has been converted into equity without the actual allocation of any shares.

29. In addition to that Clauses 5.8.1 and 7.4 of chapter IV of the resolution plan explicitly preserve the FCs rights against personal guarantors. The Clause 5.8 maintains that FCs retain their rights on personal guarantees, overriding any conflicting terms in the resolution plan. Clause 7.4 indicates that claims

against former promoter directors are not extinguished. The relevant extract of the clauses is mentioned below:

> **5.8 Third Party Collateral**
>
> 5.8.1 Notwithstanding anything contained in this Resolution Plan, the Financial Creditors will reserve their right on:
>
> (a) all security interest created on movable or immovable properties in the form of mortgage or hypothecation by any person other than the Company in favour of the Financial Creditors in consideration of the debt extended by the Financial Creditors to the Company;
>
> (b) personal guarantees in favour of the Financial Creditors in consideration of the debt extended by the Financial Creditors to the Company; and
>
> (c) the corporate guarantees provided by any person other than the Company which are securing. secured by or in consideration of a charge in the form of mortgage or hypothecation (only to the extent of such charged properties which are mortgaged or hypothecation).
>
> **7.4 Treatment of Ongoing and New Litigation:**
>
> 7.4.1 Save and except for the rights available under the provisions of Clause 5.8 of this Chapter IV, all Inquiries, investigations, notices, causes of action, suits, claims, disputes, litigation, arbitration or other Judicial, regulatory or administrative proceedings against the Company or any stakeholders of the Company (except the erstwhile promoter directors of the Company) initiated by any creditor (Financial Creditor or Operational Creditor), Person or Governmental Authority (including contingent liabilities). whether forming part of admitted claims or not, present or future, in relation to any period prior to the NCLT Approval Date shall stand extinguished by virtue of the NCLT Approval Order and accordingly. all such proceedings, inquiries, investigations, etc. shall be disposed of and all liabilities or obligations In relation thereto, whether or not set out in the balance sheets of the Company or the profit and loss account statements of the Company, will be deemed to have been written off in full and permanently extinguished by virtue of the order of the Adjudicating Authority approving this Resolution Plan and the Resolution Applicant shall, at no point of time be, directly or indirectly, held responsible or liable in relation thereto,

30. Based on the aforementioned observations, it is clear that the liability of the PG does not extinguish even after the approval of the resolution plan, as long as the debt owed to the FC has not been fully paid in accordance with Clause 4 of the guarantee deed dated 11.01.2013. Although the resolution plan includes provisions for converting the FC's debt into equity, the CD's failure to adhere to the necessary procedural requirements and the explicit

preservation of the FC's rights against personal guarantors indicates that the PG's liability remains intact.

31. Besides, the nature and extent of the liability depend on the terms of the guarantee itself. When the guarantee is univocal, the liability of the guarantor continues and there is no contract between the FC and CD which may discharge the guarantor under section 134. Even discharge obtained by operation of law in bankruptcy proceedings does not absolve the surety of his liability. We may also profitably refer to the decision of the Hon'ble Supreme Court in the matter of ***Lalit Kumar Jain v. Union of India & others SCC OnLine SC396 2021*** wherein it was held that:

> 111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

32. Accordingly, liability of the Financial Creditor has not been discharged and the guarantor is liable to repay the remaining loan amount.

Maintainability of Application under section 95(1) of the IBC against the PG when the CD is not under CIRP or liquidation.

33. The initiation of proceedings against the PG is distinct from the CIRP. The absence of any pending CIRP or liquidation proceedings against the CD does not preclude the FC from initiating insolvency proceedings against the PG. Consequently, the Application filed by the FC under Section 95(1) of the Insolvency and Bankruptcy Code (IBC) is valid and the objections raised by the PG in this regard are not sustainable. A similar observation was made by

the Hon'ble NCLAT in the case of ***State Bank of India v. Mahendra Kumar Jajodia, Company Appeal (AT) Insolvency No. 60 of 2022,*** where it is held that:

> 11. The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under Section 95(1) filed by the Appellant is not maintainable. The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT.

34. The Resolution Professional has also recommended for admission of the present petition against the Personal Guarantor/ Respondent No. 1 as enshrined in Sec. 101(1) of the IBC 2016. The Personal Guarantor has also not raised any other point of significance for consideration.

35. **FINAL ORDER**

1. In view of the aforesaid discussions, we allow the **CP(IB) No.54/95/HDB/2021**under the provisions of Section 100 of the Code, 2016 and Insolvency Resolution Process is initiated against Mr. Sumanth Paturu, the Personal Guarantor, and moratorium is declared in relation to all debts, which begins from the date of admission of the instant petition and shall cease to have effect at the end of the period of 180 days, as provided under Section 101 of the Code, 2016. During the moratorium period-

   a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

b) The Creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

c) The debtor shall not transfer, alienate, encumber or dispose of any of her assets or her legal rights or beneficial interest therein;

d) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

e) The Resolution Professional, Mr. Bhattiprolu Pavan Kumar, having Registration No.IBBI/IPA-002/IP N00762/2018-19/12371, email: bhattiprolupavan@gmail.com, Mobile No.9848084284, who was appointed vide order dated 24.09.2021 is directed to cause public notice published on behalf of the Adjudicating Authority within 7 days from the date of uploading of this order on the website of NCLT, Hyderabad, inviting the claims from all creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102(2) of the Code. The publication of notice shall be made in newspapers, one in English and other in vernacular (Telugu) which have wide circulation in the State where the Personal Guarantor and CD resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed on our website by the Registry and the other shall be affixed in the premises of this Adjudicating Authority.

f) The Resolution Professional in exercise of the powers conferred under the Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The Personal Guarantor shall prepare, in consultation with the Resolution professional, a repayment plan containing a proposal to the creditors for restructuring of her debts or affairs as provided under Section 105 which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106.

g) In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of creditors should be summoned, he shall specify the details as provided under Section 106(3). The date of meeting shall not be less that fourteen days or more than 28 days from the date of submission of the Report under Sub-section (1) of Section 106 of the Code, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of the Code.

h) The meeting of the creditors shall be conducted in accordance with the provisions Sections 109, 110 and 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and

submit the same to the Authority, copies of which shall be provided to the guarantor and the creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the Code.

i) The Petitioner is directed to communicate this order to the Resolution Professional appointed in the instant Company Petition immediately.

SD/-

SANJAY PURI
MEMBER (TECHNICAL)

SD/-

RAJEEV BHARDWAJ
MEMBER (JUDICIAL)